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## MONDELEZ MALAYSIA SDN BHD v. PP

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID JC
[CRIMINAL REVISION NO: PA-44-38-07-2019]
7 JANUARY 2020

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***CRIMINAL PROCEDURE:*** *Prosecution – Consent – Prosecution for offence pursuant to reg. 38(1) of Food Regulations 1985 – Consent to prosecute did not contain name of Deputy Public Prosecutor – Whether there was consent to prosecute – Whether court could take cognisance of offence – Whether prosecution could initiate proceedings against accused person – Whether there was consent – Whether consent defective – Whether obligatory for prosecution to deliver copy of consent to accused person – Whether proceedings against accused person valid – Criminal Procedure Code, s. 51A*

C

***FOOD AND DRUGS:*** *Food – Contaminant – Prosecution for offence pursuant to reg. 38(1) of Food Regulations 1985 – Consent to prosecute did not contain name of Deputy Public Prosecutor – Whether there was consent to prosecute – Whether consent defective – Food Act 1983, s. 32A – Food Regulations 1985, reg. 38(1)*

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A summons was issued against the applicant by the Magistrate's Court, pursuant to reg. 38(1) of the Food Regulations 1985, regarding food contaminant. When the matter first came for mention before the Magistrate, the prosecuting officer tendered two documents, namely the authority and consent to prosecute. When the matter came up for trial later, the applicant objected against the validity of the proceedings before the Magistrate on the grounds that (i) the issuance of the summons was invalid; (ii) there was no consent to enable the court to take cognisance of the offence and to initiate proceedings against the applicant; (iii) the copy of consent delivered to the applicant, pursuant to s. 51A of the Criminal Procedure Code ('CPC'), was defective as it did not contain the name of the Deputy Public Prosecutor ('DPP'). The prosecution argued that it was not obligatory for a copy of the consent to be delivered to the applicant and the relevant copy was the one filed with the court. The Magistrate rejected the applicant's objection. The applicant then applied for a stay of proceedings pending filing and hearing of a review of the Magistrate's ruling on the objection. The request was allowed and the applicant filed the present notice of motion to set aside and/or quash the prosecution of the offence against the applicant on grounds that the consent was invalid as it did not contain the name of the DPP. Three copies of exhibits were examined namely (i) exh. EG-3 where the consent was devoid of the DPP's name; (ii) exh. EG-5 which did not have the name of the DPP and contained a different signature than that of in exh. EG-3; and (iii) RIH-3 which disclosed a different copy of the consent compared to exhs. EG-3 and EG-5.

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**Held (dismissing notice of motion):**

**(1)** Section 32A of the Food Act 1983 ('Act') clearly states that no prosecution shall be instituted for an offence, under the CPC or any regulation, without the consent written of the Public Prosecutor. It is trite law where a written consent is required for the institution and that written consent is not obtained, the charge and prosecution would be rendered invalid. (para 22)

**(2)** The only copy relevant for consideration was one which was found in the Magistrate's Court's physical file. That would have been the copy or copies filed by the DPP. The contents of the file revealed two copies of the consent. Both copies contained a faint blue chop with the words 'Shafiq bin Mahadi, Timbalan Pendakwa Raya, Pulau Pinang'. Each copy was signed, presumably by Shafiq bin Mahadi. One of the copies has 'B' marked on it ('marked copy') while the other copy was unmarked ('unmarked copy'). Save for the absence of the name chop, exh. EG-3 corresponded with the marked copy. Exhibit EG-3 might have been an extra copy that was kept by the prosecution and whether or not it was the copy of the consent found in the court file was inconsequential to the issue. (paras 26 & 27)

**(3)** There was no obligation on the part of the prosecution to ensure that the copy of the consent provided pursuant to s. 51A of the CPC must be a copy of the consent actually filed in the Magistrate's Court. All the prosecution needed to do at that stage was just to provide a copy of the consent even if it was just an extra copy to serve as a confirmation that such a consent was filed and would be part of the evidence that would be tendered for the prosecution. Where the copy of the consent does not appear to comply with the requirements of the law, as in this case, then the consent filed in the Magistrate's Court and which will be tendered as part of the evidence for the prosecution would be subject to challenge. Further consideration of exh. EG-3 was dismissed as being irrelevant for the determination of the issue in this case. (para 27)

**(4)** Comparing exh. EG-5 with both the marked and unmarked copies, exh. EG-5 corresponded with the unmarked copy in terms of the handwriting of the dates and the signature. It was fairly obvious that, when the Magistrate's Court faxed a copy of the consent, the sender picked the unmarked copy. This explained why exh. EG-5 did not have the marking 'B' similar to exh. RIH-3. As for the absence of the name chop of the DPP, that could be attributed to the faint light blue colour name chop affixed to the consent. The poor quality of the name chop might have caused its image to be lost and not capable of being reproduced when it was transmitted *via* facsimile. There was no reason to conclude that exh. EG-5 was an invalid consent. The unmarked copy

found in the court's file had the name chop of the DPP, the date and signature. This copy constituted a valid proof of consent under s. 32A of the Act. What remained to be determined with regards to exh. RIH-3 was academic. (paras 28 & 30)

**(5)** The Magistrate had not erred in rejecting the applicant's objection. This matter was remitted back to the Magistrate's Court for trial and a mention date shall be fixed by the Magistrate's Court for that purpose. (paras 30 & 36)

**Case(s) referred to:**
*Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 31
Criminal Procedure Code, ss. 51A, 325, 377(b)
Food Act 1983, s. 32A
Food Regulations 1985, reg. 38(1)

*For the applicant - Esther Goh Lee Ern & Joachim Francis Xavier; M/s Chooi & Company + Cheang & Ariff*
*For the respondent - Rais lmran Hamid; DPP*

*Reported by Najib Tamby*

## JUDGMENT

**Mohd Radzi Abdul Hamid JC:**

### Matter Before This Court

**[1]** The matter before this court is with respect to a notice of motion dated 19 July 2019 (NOM) filed by the applicant seeking the revision powers of this court with respect to the matter of whether a valid consent (consent) was filed by the prosecution pursuant to s. 32A of the Food Act 1983 (Act).

### Proceedings Before The Magistrate

**[2]** A summons was issued against applicant by the Magistrate's Court for an offence under reg. 38(1) of the Food Regulations 1985 (summons).

**[3]** The summons read as follows:

> Bahawa kamu pada 9.3.2018 lebih kurang jam 3.45 petang, di Kompleks Kargo Udara Ke-2 Lapangan Terbang Antarabangsa P24, Bayan Lepas dalam daerah Barat Daya dalam Negeri Pulau Pinang, telah mengimport Cheese Powder Flavour yang setelah dianalisis mengandungi cemaran logam cadmium dalam kadar 1.41 mg/kg di mana melebihi kadar maksimum dibenarkan iaitu 1 mg/kg merujuk Jadual Keempat Belas, Daftar 1, Ruang (1) Bahan Perisa, Peraturan-Peraturan Makanan 1985. Oleh itu, kamu telah didapati melanggar peruntukan di bawah Peraturan 38(1) Peraturan-Peraturan Makanan 1985.

**[4]** On 10 October 2018 when the matter first came up for mention before the Magistrate, the prosecuting officer had tendered two documents to the Magistrate's Court. A document marked as "encl. A" was the authority to prosecute pursuant to s. 377(b) of the Criminal Procedure Code (CPC) and a document marked as "encl. B" that is the consent to prosecute pursuant to s. 32A of the Act.

**[5]** When the matter came up for trial again on 28 May 2019, learned counsel for the applicant raised an objection with regards to the validity of the proceedings before the court on the grounds that there was no consent that enabled the court to take cognizance of the offence and to initiate proceedings against the applicant. Essentially, it was the assertion before the Magistrate that the copy of the consent dated 3 August 2018 that was delivered to the applicant pursuant to s. 51A of the CPC did not contain the name of the Deputy Public Prosecutor notwithstanding that it contained a signature at the space marked "Timbalan Pendakwa Raya, Negeri Pulau Pinang". Since the name of the Deputy Public Prosecutor was not found on the copy of the consent, the consent was therefore defective and by that reason, the Magistrate's Court could not have cognizance of the offence and consequently the issuance of the summons is invalid.

**[6]** It was argued by the prosecution that a copy of the consent is not obligatory to be delivered to the applicant under s. 51A of the CPC and that the relevant copy is one that is filed with the court.

**[7]** After considering the submissions of the prosecution and counsel for the applicant, the Magistrate rejected the objection. The applicant's counsel applied for a stay of proceedings pending filing and hearing of a review of the Magistrate's ruling on the objection. The request was allowed, thus the NOM was filed and brought to be adjudicated before this court.

**The Notice Of Motion And Proceedings Before This Court**

**[8]** *Via* the NOM, the applicant seeks the powers of revision of this court pursuant to s. 325 of the CPC to set aside and/or quash the prosecution of the offence against the applicant on the basis that the consent dated 3 August 2018 is invalid as it did not contain the name of the Deputy Public Prosecutor.

**[9]** The NOM is supported by the affidavit of Esther Goh Lee Ern, counsel for the applicant who was empowered to affirm the affidavit in support on behalf of the applicant (AIS-E). In AIS-E, the applicant exhibited a copy of the consent that was delivered by the prosecution to the applicant pursuant to s. 51A of the CPC. Exhibit EG-3 in AIS-E contains all the documents that were delivered by the prosecution to the applicant including the consent dated 3 August 2018. A look at the copy of the consent in exh. EG-3 will show that the name of the Deputy Public Prosecutor is absent on its face.

**[10]** According to AIS-E, on 3 June 2019, she wrote to the Magistrate's Court at Balik Pulau, Pulau Pinang requesting for copies of the relevant documents including the consent. By a letter dated 4 July 2019, the Magistrate's Court complied with the request and provided copies of the relevant documents including a copy of the consent dated 3 August 2018. That copy is marked as exh. EG-5 in AIS-E.

**[11]** A comparison of exhs. EG-3 and EG-5 will show that both copies do not have the name of the Deputy Public Prosecutor and more importantly, exh. EG-5 seems to contain a different signature than that contained in exh. EG-3. That raises the question of which of these two documents is the actual consent that was filed with Magistrate's Court. In both copies, the name of the Deputy Public Prosecutor is absent and therefore the applicant believes that there is no valid consent filed with the Magistrate's Court.

**[12]** The NOM and AIS-E was served on the respondent. An affidavit in reply dated 13 September 2019 by Rais lmran bin Hamid (Rais) was filed on behalf of the respondent and served on the applicant (AIR-R1). Rais stated that on 23 August 2019, he wrote to the Magistrate's Court requesting for copies of the relevant documents pertaining to the proceedings before the Magistrate including the consent. The Magistrate's Court responded by way of a letter dated 3 September 2019 enclosing the relevant documents including a copy of the consent. This copy of the consent is marked as exh. RIH-3 in AIR-R1.

**[13]** Exhibit RIH-3 discloses a seemingly different copy of the consent compared to exh. EG-3 and EG-5. The difference is that this copy contains a marking "B" at the top right-hand corner of the document and a barely legible shadow of some kind of print or chop at the space where the name of the Deputy Public Prosecutor is to be inserted. Exhibit RIH-3 thus added to the confusion regarding which of these documents ie, exh. EG-3, EG-5 and RIH-3, is the actual consent.

**[14]** The applicant then responded with an affidavit in reply dated 14 October 2019 affirmed again by Esther Goh Lee Ern for the applicant (AIR-E). In this affidavit, Esther produced the notes of proceedings at the Magistrate's Court to highlight the events that transpired before the Magistrate and to further emphasise the uncertainty of the consent.

**[15]** When this matter was fixed for hearing again before this court on 17 October 2019, this court held the view that after considering AIS-E, AIR-R1, exh. EG-3, exh. EG-5 and exh. RIH-3, a physical inspection of the Magistrate's Court's file was inevitable and therefore ordered for the file to be remitted to this court for inspection. This court further ordered that the Deputy Public Prosecutor Shafiq bin Mahadi whom according to AIR-R had affixed his chop and signed the consent on exh. RIH-3 to affirm an affidavit to explain the circumstances and confusion regarding the consent. This court then adjourned this matter to 22 November 2019 for continued hearing.

**[16]** By the 22 November 2019, two additional affidavits were filed for the respondent. One was an affidavit by Rais dated 14 November 2019 (AIR-R2) and an affidavit by Shafiq bin Mahadi affirmed on 15 November 2019 (A-SM). AIR-R2 is a general response to AIR-E and asserts that a physical inspection of the Magistrate's Court's file will show that exh. RIH-3 is the valid consent. The more important affidavit is A-SM. In his affidavit, Shafiq bin Mahadi had primarily confirmed that exh. RIH-3 dated 3 August 2019 was issued and signed by him.

**Submissions**

**[17]** Learned counsel for the applicant submitted that notwithstanding A-SM, there remains a doubt as to which of the different versions of the consent ie, exh. EG-3, EG-5 or RIH-3 is the valid consent since Shafiq bin Mahadi did not explain in A-SM why there was a version exh. EG-3 and EG-5. That failure to explain has the effect of putting the issues unanswered. Learned counsel for the applicant further stated that if A-SM had clearly explained the differences to the satisfaction of this court, then the applicant would have been ready to abandon the application.

**[18]** The differences that remain unanswered, according to the applicant, are as follows:

(a) exhibit EG-3 and EG-5 seem to contain different signatures;

(b) there are differences in writings at the space for insertion of dates in exh. EG-3, EG-5 and RIH-3;

(c) there is a mark "B" at the top right-hand corner of exh. RIH-3 but such mark is not present in the other copies; and

(d) there appears to be an imprint on exh. RIH-3 but that imprint is absent from the exh. EG-5 being the copy of consent that was faxed by the Magistrate's Court to the applicant.

**[19]** Based on the above factors, it was submitted that there remains a doubt on which of the consent between exh. EG-3, EG-5 and RIH-3 is the correct and valid consent and that doubt should be for the benefit of the applicant.

**[20]** Learned Deputy Public Prosecutor essentially argued that exh. RIH-3 is the correct copy of the consent and that copy is the copy that was filed in the Magistrate's Court. According to him, there were two copies of the consent filed, one with the complaint and the other was marked as "encl. B" during the court proceedings on 10 October 2019. Thus, according to learned Deputy Public Prosecutor, the Magistrate was correct in rejecting the preliminary objection.

**[21]** In response to that argument, learned counsel for the applicant submitted that A-SM did not offer any explanation on the issue. At best, what was related to by the Deputy Public Prosecutor was just a statement from the Bar and cannot be taken as a confirmation of fact. The uncertainty therefore remains unanswered.

**The Law On Consent**

**[22]** Section 32A of the Act clearly states that no prosecution shall be instituted for an offence under the Act or any regulation without the consent in writing of the Public Prosecutor. It is trite law that where a written consent is required for the institution of a prosecution and that written consent is not obtained, it will render the charge and prosecution invalid.

**Power Of Revision**

**[23]** The power of revision by the High Court are found in s. 31 of the Courts of Judicature Act 1964 and s. 325 of the CPC.

**[24]** Abdul Hamid CJ (as he then was) in the Supreme Court case of *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69, described the duty of the High Court in exercising its revisionary powers as follows:

> Duty of High Court
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> Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court.
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> The Judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court. Where, for instance, a convicted person has scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the Judge ought to call for and examine the record with a view to exercising the revisionary power to correct a miscarriage of justice.

**Analysis Of Facts By This Court**

*With Regards To Exh. EG-3*

**[25]** It is clear that the only crucial question to be answered in this case is which of the copy exh. EG-3, EG-5 or RIH-3 is the valid consent or none at all. It is unfortunate that the case management system (CMS) is currently not available at the Magistrate's Court in question. A record of the filing of the summons and consent would have been available in the CMS system and that would have easily and conclusively provided the answer to that question. It therefore falls upon this court to undertake a scrutiny of the documents found in the Magistrate's Court's physical file (file).

**[26]** In this court's view, the only copy that is relevant to be considered is that which is found in the file. That would have been the copy or copies that were filed by the Deputy Public Prosecutor. After inspecting the contents of the file, this court finds that there are two copies of the consent. Both contained a faint blue chop with the words "Shafiq bin Mahadi, Timbalan Pendakwa Raya, Pulau Pinang". Each copy is signed, presumably by Shafiq bin Mahadi. Both are dated 3 August 2018. One of the copies has "B" marked at the top right-hand corner of the page (marked copy) and the other is unmarked (unmarked copy). The marked copy contains also a handwritten correction next to the column for the date of the consent.

**[27]** Looking first at exh. EG-3 found in AIS-E, this court finds that this copy corresponds with the marked copy save for the absence of the name chop. However, whether or not the exh. EG-3 corresponds with any of the copy in the file is not crucial to the issue. Whilst it would have been most ideal if an explanation of EG-3 is found in A-SM, that absence does not affect the eventual finding of this court. exh. EG-3 may have been an extra copy that was kept by the prosecution and whether or not it is the copy of the consent that is found in the court file is inconsequential to the issue. There is no obligation on the prosecution to ensure that the copy of the consent provided pursuant to s. 51A of the CPC must be a copy of the consent actually filed in the Magistrate's Court. All the prosecution needs to do at that stage is just provide a copy of the consent even if it was just an extra copy to serve as a confirmation that such a consent was filed and will be part of the evidence that will be tendered for the prosecution. Where the copy of the consent does not appear to comply with the requirements of the law, as in this case, then the consent that was filed in the Magistrate's Court and which will be tendered as part of the evidence for the prosecution will be subject to challenge. For those reasons, this court dismisses further consideration of exh. EG-3 as being irrelevant for determination of the issues in this case.

*With Regards To Exh. EG-5*

**[28]** Comparing exh. EG-5 with both the marked copy and unmarked copy, this court finds that exh. EG-5 corresponds with the unmarked copy in terms of the handwriting of the dates and the signature. It is fairly obvious therefore that when the Magistrate's Court faxed a copy of the consent, the sender picked the unmarked copy. That explains why exh. EG-5 does not have the marking "B" at the top right-hand corner similar to exh. RIH-3. As for the absence of the name chop or name of the Deputy Public Prosecutor, that can be attributed to the faint light blue color name chop that was affixed to the consent. The poor quality of the name chop may have caused its image to be lost and not capable of being reproduced when it was transmitted *via* facsimile. Based on those reasons, this court finds no reason to conclude that exh. EG-5 is an invalid consent. The unmarked copy as found in the file has

the name chop of the Deputy Public Prosecutor, the date and signature. In the evaluation and finding of this court, this copy therefore constitutes a valid proof of consent under s. 32A of the Act.

*With Regards To Exh. RIH-3*

**[29]** Comparing exh. RIH-3 to the marked copy, this court finds that they are exact copies with regards to the marking "B" at the top right-hand corner, handwriting of the date, the initial next to the figure "8" and the signature. The absence of the name chop or name of the Deputy Public Prosecutor in exh. RIH-3 can similarly be explained like in the case of exh. EG-3. The faint light blue name chop could not be reproduced when photocopied. In the opinion of this court, the mystery of the missing name chop in both exhs. EG-5 and RIH-3 is thereby solved.

**[30]** Since this court has accepted the unmarked copy as sufficient proof of consent pursuant to s. 32A of the Act, then what remains to be determined with regards to exh. RIH-3 is academic. Nonetheless, for the sake of completeness, this court finds that the marked copy is the copy that was marked as encl. B when this case was called for mention before the Magistrate on 10 October 2018. This court therefore finds that the Magistrate had not erred in rejecting the applicant's preliminary objection. Based on both copies of the consent as found in the file, there is therefore no doubt that a valid consent was filed in accordance with s. 32A of the Act.

**General Observation**

**[31]** In reading the notes of proceedings before the Magistrate's Court, this court finds that this NOM could have been avoided if parties had taken proper and effective steps to clarify the issues before the Magistrate.

**[32]** At para. 11 of AIS-E it was stated that the consent was marked as exh. P1 on the mention date of 28 May 2019. Yet, the inspection of the file only showed that the consent was marked as "encl. B" and there is no other copy of the consent marked as "P1". The re-marking, as it were, of the consent was unnecessary as it was already marked as "encl. B" on 10 October 2018. This consequently contributed to and caused further confusion to the matter.

**[33]** That confusion was then compounded after the applicant received exh. EG-5 from the Magistrate's Court. It seems that from the notes of proceedings neither the prosecution nor the applicant's counsel took any step to request for a physical inspection of the consent in the file on 28 May 2019 or on any date before the NOM was filed. That small step could have answered all issues and concluded the matter. This court can only guess that since the focus was on the copy of the consent that was provided to the applicant pursuant to s. 51A of the CPC, all the parties' concerned overlooked to consider that the only relevant copy to be considered is the one that was filed with the Magistrate's Court and this could have been easily determined by inspecting the file.

**[34]** The adventure to obtain copies of the consent *via* facsimile and photocopy further proved to be unhelpful. It must have escaped the attention of the sender of the documents that faint name chops or prints may not be able to be clearly reproduced when sent *via* facsimile or photocopied. It seems also that there was no care taken to ensure that the facsimile or photocopy will be able to reproduce an exact copy of the original document. If that was done, much of the court's and respective parties time and costs, here and below, would have been saved.

**Decision**

**[35]** Therefore, based on all the matters stated above, the notice of motion is hereby dismissed.

**[36]** The matter is hereby remitted back to the Magistrate's Court for trial and a mention date shall be fixed by the Magistrate's Court for that purpose.